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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 GBB1, INC. and VICTOR FRANCO,

11 Plaintiffs,

12 vs.

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14  
15 JP MORGAN CHASE BANK NATIONAL  
16 ASSOCIATION, and DOES 1 to 250,  
inclusive,

17 Defendants.  
18

CASE NO. 12CV849 JLS (WVG)

**ORDER (1) GRANTING  
PLAINTIFFS' MOTION SEEKING  
LEAVE TO FILE FIRST  
AMENDED COMPLAINT AND  
(2) DENYING AS MOOT  
DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S  
COMPLAINT AND MOTION TO  
EXPUNGE RECORDED LIS  
PENDENS**

(ECF Nos. 6, 9)

Presently before the Court are Defendant JP Morgan Chase Bank, N.A.'s ("JP Morgan" or "Defendant") Motion to Dismiss Plaintiff's Complaint and Motion to Expunge Recorded Lis Pendens, (Mot. to Dismiss, ECF No. 6), and Plaintiffs GBB1, Inc. ("GBB1") and Victor Franco's ("Franco," and collectively "Plaintiffs") Motion Seeking Leave to File First Amended Complaint, (Mot. File FAC, ECF No. 9). Also before the Court is JP Morgan's response in opposition to Plaintiffs' motion for leave to amend. (Resp. in Opp'n, ECF No. 16) The hearings set for the motions on June 21, 2012, and July 5, 2012, respectively, were vacated, and the matters taken under submission on the papers. Having considered the parties' arguments and the law, the Court **GRANTS** Plaintiffs' motion for leave to file an amended complaint and **DENIES AS MOOT** JP Morgan's motion to dismiss.

## BACKGROUND

2 Plaintiffs first filed this action in the Superior Court of California for the County of San  
3 Diego on February 24, 2012. (Notice of Removal Ex. A,<sup>1</sup> at 11, ECF No. 1) The original  
4 complaint asserts one cause of action for rescission of notice of default. (*Id.* at 13–14)

5 On April 6, 2012, JP Morgan removed to this Court on grounds of diversity jurisdiction,  
6 (Notice of Removal, ECF No. 1), and thereafter filed a motion to dismiss on April 12, 2012, (Mot.  
7 to Dismiss, ECF No. 6). The Court set a briefing schedule on JP Morgan's motion to dismiss,  
8 directing Plaintiffs to respond on or before May 10, 2012. (Order, Apr. 18, 2012, ECF No. 8)

9 Before the deadline to respond to the motion to dismiss and just one day after the period  
10 for amendment as a matter of course, *see* Fed. R. Civ. P. 15(a)(1)(B),<sup>2</sup> Plaintiffs filed their motion  
11 for leave to file an amended complaint, (Mot. File FAC, ECF No. 9). But as of the date of this  
12 Order, Plaintiffs have failed to respond to JP Morgan’s motion to dismiss.<sup>3</sup> Nor did they file their  
13 (optional) reply in support of their motion for leave to amend.

14 Plaintiffs' amended complaint seeks to drop GBB1 as a plaintiff, add Enriqueta Franco as a  
15 plaintiff, and to "provid[e] the court with a full and complete statement of facts and the basis for  
16 the relief sought by the Plaintiffs." (Mot. File FAC 3, ECF No. 9) The proposed amended  
17 complaint contains fifty-eight paragraphs to the original complaint's fifteen, but still asserts just

<sup>1</sup> Pin cites to exhibits utilize the page numbers assigned by CM/ECF.

<sup>2</sup> Federal Rule of Civil Procedure 15(a)(1)(B) allows for amending as a matter of course within twenty-one days after service of a motion under Rule 12(b). Here, JP Morgan's Rule 12(b) motion was filed on April 12, 2012, and accordingly Plaintiffs had until May 3, 2012, to amend without seeking the Court's leave. Rather than take advantage of this right to amend as a matter of course, Plaintiffs filed their motion one day after the twenty-one day period expired, on May 4, 2012.

23 <sup>3</sup> Civil Local Rule 7.1.e.2 requires a party opposing a motion to file an opposition or statement  
24 of nonopposition no later than fourteen days prior to the noticed hearing, unless otherwise provided by  
25 Court Order. Under Local Rule 7.1.f.3.c, “[i]f an opposing party fails to file the papers in the manner  
26 requested by Civil Local Rule 7.1.e.2, that failure may constitute a consent to the granting of a motion  
or other request for ruling by the court.” “The Ninth Circuit has held a district court may properly  
grant an unopposed motion to dismiss pursuant to a local rule where the local rule permits, but does  
not require, the granting of a motion for failure to respond.” *Navarro v. Greenlight Fin. Servs.*, No.  
10cv1631, 2010 U.S. Dist. LEXIS 111018, at \*3–4 (S.D. Cal. Oct. 19, 2010) (citing *Ghazali v. Moran*,  
46 F.3d 52, 53 (9th Cir. 1995)).

27 Thus, pursuant to the Local Rules, the Court may grant JP Morgan's motion solely on the basis  
28 of Plaintiffs' failure to respond. But the Court is not required to do so. Here, the Court finds that in  
the interests of justice dismissal on this basis is not warranted. Plaintiffs are advised, however, that  
any future failures to comply with this Court's Orders and deadlines may result in sanctions.

1 one cause of action: “Set aside of trustee sale.” (Proposed FAC, ECF No. 9-1) In addition, it  
 2 appears to add several allegations with the purpose of curing some of the deficiencies noted in JP  
 3 Morgan’s motion to dismiss. (*See, e.g., id.* ¶¶ 56–58 (alleging that tender is not required in this  
 4 case))

5 **LEGAL STANDARD**

6 Leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P.  
 7 15(a)(2). But while the rule should be interpreted extremely liberally, leave should not be granted  
 8 automatically. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). “The party  
 9 opposing amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*,  
 10 833 F.2d 183, 187 (9th Cir. 1987). A trial court may deny a motion for leave to amend based on  
 11 various factors, including bad faith, undue delay, prejudice to the opposing party, futility of  
 12 amendment, and whether the party has previously amended. *Foman v. Davis*, 371 U.S. 178, 182  
 13 (1962).

14 **ANALYSIS**

15 JP Morgan opposes Plaintiffs’ motion for leave to amend primarily on the basis that  
 16 amendment would be futile, but also because of undue delay, bad faith, and prejudice. (*See*  
 17 *generally* Resp. in Opp’n, ECF No. 16) The Court considers each in turn.

18 **1. Futility**

19 “A proposed amendment is futile only if no set of facts can be proven under the  
 20 amendment to the pleadings that would constitute a valid and sufficient claim.” *Miller v. Rykoff-*  
*Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). In its pending motion to dismiss and in opposition  
 21 to Plaintiffs’ motion for leave to amend, JP Morgan lists several reasons why Plaintiffs’ claims fail  
 22 as a matter of law. At this early stage, however, the Court, in its discretion, declines to deny leave  
 23 to amend for futility without prejudice to JP Morgan bringing a renewed motion to dismiss.

25 Because Plaintiffs neither opposed JP Morgan’s motion to dismiss nor filed a reply in  
 26 support of their motion for leave to file an amended complaint, Plaintiffs have yet to address any  
 27 of the arguments raised by JP Morgan in support of dismissal. In light of the fact that the Court  
 28 has yet to hear from Plaintiffs on any of these issues, and because the proposed amended

1 complaint purports to address several of the deficiencies of the original complaint, the Court  
 2 cannot find at this juncture that “no set of facts can be proven under the amendment to the  
 3 pleadings that could constitute a valid and sufficient claim.” *Miller*, 845 F.2d at 214. Thus, the  
 4 Court declines to deny leave to amend on the basis of futility.

5 **2. Undue Delay, Bad Faith, Prejudice**

6 In most situations, undue delay by itself “is insufficient to justify denying a motion to  
 7 amend.” *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). But in some egregious cases, delays  
 8 may be sufficient on their own to deny amendment. *See AmerisourceBergen Corp v. Dialysis*  
 9 *West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006). Under the undue delay analysis, a relevant inquiry  
 10 is also whether the plaintiff “knew or should have known the facts and theories raised by the  
 11 amendment in the original pleading.” *Jackson*, 902 F.2d at 1388.

12 JP Morgan asserts that because Enriqueta Franco was Plaintiff Franco’s wife at the time the  
 13 original complaint was filed, there is no reason she should not have been joined as a party at the  
 14 time of filing. While the Court has an aversion towards allowing amendments that could have  
 15 been made earlier, the Court is not convinced that Plaintiffs’ decision not to amend at an earlier  
 16 date was a tactical one. Indeed, more tactical would have been to amend one day sooner, when  
 17 they could have done so without seeking the Court’s permission.

18 JP Morgan additionally suggests that Plaintiffs’ “actions are nothing more than a tactical  
 19 maneuver to avoid having to answer for failing to respond to Defendant’s Motion to Dismiss,  
 20 resulting in undue prejudice to Defendant.” (Resp. in Opp’n 10, ECF No. 16) While this  
 21 argument would seem to have merit in light of Plaintiffs’ failure to respond to JP Morgan’s motion  
 22 to dismiss—which, as explained *supra* at note 3, is grounds for granting the motion—the Court  
 23 again doubts that Plaintiffs’ move was a tactical one. Plaintiffs filed their motion *before* their  
 24 opposition to JP Morgan’s motion was due; it could only have been a tactical move to avoid  
 25 dismissal for failure to respond if it had been filed *after* the opposition was due.

26 Moreover, the Court notes this case has been pending only since April 2012. In light of the  
 27 Court’s preference to dispose of cases on the merits, Plaintiffs’ motion for leave to amend will not  
 28 be denied on the basis of undue delay, bad faith, or prejudice to JP Morgan.

### 1 || 3. Motion to Dismiss

2 “[An] amended complaint supersedes the original, the latter being treated thereafter as non-  
3 existent.” *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). As such, JP Morgan’s pending motion to  
4 dismiss concerning the original complaint must be **DENIED AS MOOT**.

## CONCLUSION

6 For the reasons stated above, Plaintiffs' motion for leave to file an amended complaint is  
7 **GRANTED**. Plaintiff **SHALL FILE** their amended complaint within fourteen days of the date  
8 this Order is electronically docketed. JP Morgan's motion to dismiss is **DENIED AS MOOT**.

## IT IS SO ORDERED.

11 | DATED: August 17, 2012

Janis L. Sammartino  
Honorable Janis L. Sammartino  
United States District Judge